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No. 96-415

In the Supreme Court of the United States

OCTOBER TERM, 1996

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
PETITIONERS

v.

FEDERAL ELECTION COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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21 pp

QUESTION PRESENTED

Whether the court of appeals properly upheld the Federal Election Commission's regulation defining what constitutes the "best efforts" of political committees to obtain and report identifying information about their contributors under 2 U.S.C. 432(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 76 F.3d 400. The opinion and judgment of the district court (Pet. App. 23a-35a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1996. A petition for rehearing was denied on June 11, 1996 (Pet. App. 36a-37a). The petition for a writ of certiorari was filed on September 9, 1996. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT

1. This case concerns a regulation under the Federal Election Campaign Act of 1971 (FECA or Act), 2 U.S.C. 431 *et seq.* The Act requires political committees to disclose to the Federal Election Commission (FEC),[1] *inter alia*, the name, mailing address, occupation, and employer of each contributor whose aggregate annual contributions exceed $200. 2 U.S.C. 431(13), 434(b)(3)(A). This Court held that reporting requirement, first enacted in 1971, against a First Amendment challenge in *Buckley* v. *Valeo*, 424 U.S. 1, 61-84 (1976), although at that time the annual threshold for requiring occupation and employer information for individuals was only $100. *Id.* at 63. The Court found the reporting thresholds "low" and recognized that "[t]hese strict requirements may well discourage participation by some citizens in the political process." *Id.* at 83. Nonetheless, it upheld them as "the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68.

The regulation at issue has its origins in a post-*Buckley* amendment to the FECA that added the following sentence to the subsection specifying the information political committees must provide in their reports to the Commission:

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[1] The Commission is an independent agency charged with the administration, interpretation, and civil enforcement of the FECA. See 2 U.S.C. 437c(b)(1), 437d(a) and (e), 437f, and 437g. Congress has expressly authorized the FEC to "formulate policy" under the Act, 2 U.S.C. 437c(b)(1), and to "make, amend, and repeal such rules * * * as are necessary to carry out the provisions of this Act," 2 U.S.C. 437d(a)(8).

> When committee treasurers and candidates show that *best efforts* have been used to obtain and submit the information required by this subsection, they shall be deemed to be in compliance with this subsection.

FECA Amendments of 1976 (1976 Amendments), Pub. L. No. 94-283, Tit. I, § 104, 90 Stat. 480 (codified at 2 U.S.C. 434(b) (1976)) (emphasis added). Four years later, the "best efforts" provision was recodified to its current form with only minor changes in the original language:

> When the treasurer of a political committee shows that *best efforts* have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of [title 26].

FECA Amendments of 1979 (1979 Amendments), Pub. L. No. 96-187, Tit. I, § 102, 93 Stat. 1347 (codified at 2 U.S.C. 432(i)) (emphasis added). The only substantive changes in the provision were the extension of the "best efforts" standard to record keeping as well as reporting, and the deletion of "candidates" as persons to whom the "best efforts" standard is directly applicable; the standard itself was untouched. The FECA has never defined the term "best efforts."

2. As originally promulgated, the regulation implementing the "best efforts" language permitted political committees to satisfy the provision by including a "clear request" for the donor information with their original solicitations. 11 C.F.R. 104.7 (1981). No further efforts to obtain donor information were required. Experience with that regulation, however,

revealed that "weaknesses in the current 'best efforts' regulations appear to have led to a significant percentage of incomplete itemizable contributions for some committees." Pet. App. 56a. For example, during the rulemaking process leading to promulgation of the changed regulation at issue in this case, one group provided a study indicating that, through June 1992, the presidential and congressional (general election) candidates had "failed to identify the donor's occupation and employer for contributions totaling over $36 million" (C.A. App. 169). In particular, the "political committees of President Bush and Governor Clinton failed to report the donor occupation/employer information for well over *half* their large individual contributions." *Ibid.* With respect to the cause of these low response rates, the Republican National Committee acknowledged that "some campaigns make a more serious effort * * * than others"; another witness "revealed that some committees put their requests for donor information in small print, or buried them among other material." Pet. App. 12a.

Such experiences led the FEC in 1993 to revise the regulation implementing the "best efforts" provision. 58 Fed. Reg. 57,725. The amended (and current) regulation provides that when a political committee is unable to obtain and report all the information required by the Act about contributors of $200 or more, the treasurer and committee will be deemed to have satisfied that statutory obligation only if, *inter alia*, the political committee sends a "stand-alone" follow-up request for the information to donors who fail to supply it in response to the committee's original solicitation. *Ibid.* The follow-up request cannot contain "material on any other subject * * * except

that it may include language solely thanking the contributor for the contribution." 11 C.F.R. 104.7(b)(2).[2]

In its Explanation and Justification for the revised regulation, the FEC discussed the pertinent legislative history of "best efforts," Pet. App. 47a-49a, and stressed the "high priority" the Act places on "the public interest in the disclosure of accurate and complete contributor information." *Id.* at 43a. The Commission "also weighed concerns regarding the costs, burdensomeness, and effectiveness of various modifications to the regulations" and "made every effort to ensure that costs are reasonable." *Ibid.* As the court of appeals concluded, "[i]n the end, the Commission's new regulation result[ed] from exactly the kind of agency balancing of various policy considerations to which courts should generally defer." *Id.* at 14a.

3. After the "best efforts" regulation became final, petitioners brought this action in district court to challenge the regulation. In an unpublished decision, the district court granted the Commission's motion for summary judgment. Pet. App. 23a-34a. The court

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[2] The regulation also required the follow-up request to include specific mandatory language describing political committees' reporting requirements, but the court of appeals invalidated and severed this portion of the regulation. Pet. App. 9a-10a, 17a. No party now challenges that portion of the court's decision. Follow-up requests may thus include an explanation of the reason for the information request, which would be "material on [the same] subject" in compliance with the regulation. See 11 C.F.R. 104.7(b)(2). Petitioners state (Pet. 7 n.6, 10 n.7) that the Commission has "changed its position" in this regard, but the Commission has simply recognized the court of appeals' decision. See Pet. App. 9a.

rejected petitioners' arguments that the legislative history of the "best efforts" provision precludes the Commission's construction and that the FEC had improperly revised its regulation. The court also rejected petitioners' First Amendment challenges to both the stand-alone follow-up requirement and the language required to be used in information requests. The court noted that the regulation only defines a defense in the event political committees fail to report all required information, and thus "does not compel political committees to do anything." *Id.* at 31a. It also found that the "added costs imposed by the new regulation are * * * a minimal burden [that] is not unconstitutional in light of *Buckley*'s recognition of the strong governmental interest involved." *Id.* at 33a (citing *Buckley*, 424 U.S. at 66-68).

4. The court of appeals affirmed in part and reversed in part. Pet. App. 1a-22a. Noting (*id.* at 3a) that Congress did not define "best efforts" when it added the statutory requirement in the 1976 Amendments or when it recodified the provision in the 1979 Amendments (see 93 Stat. 1347), the court afforded deference to the FEC by determining that there is "nothing in the phrase 'best efforts' to preclude the Commission from requiring committees to make more than one request for the information." Pet. App. 6a. The court reasoned that a 1979 House report carried "little probative weight" as "essentially post-enactment history," *ibid.*, and it rejected petitioners' other arguments that the legislative history limited "best efforts" to a single request for information. *Id.* at 7a; see also H.R. Rep. No. 422, 96th Cong., 1st Sess. 14 (1979). The court also found reasonable the Commission's revision of the regulation in light of its experience with the prior interpretation over the

previous decade. Pet. App. 8a-9a. In addition, the court rejected petitioners' argument that the regulation violated the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* After examining the FEC's rulemaking procedure in great detail (Pet. App. 10a-14a), the court concluded that "the Commission's new regulation results from exactly the kind of agency balancing of various policy considerations to which courts should generally defer." *Id.* at 14a.

With respect to the regulation's mandatory statement to be included in information requests, however, the court of appeals reversed the district court because it found the statement to be inaccurate, misleading, and contrary to the statute. Pet. App. 9a-10a. "Because the Commission's initial proposed regulation did not even include the requirement of a mandatory statement," however, the court found this portion of the regulation to be severable from the requirement of a stand-alone follow-up request. *Id.* at 17a.

Finally, the court of appeals addressed and rejected (Pet. App. 15a-17a) petitioners' First Amendment challenge to the regulation's prohibition on the stand-alone follow-up request "contain[ing] anything other than the request for the missing information, the mandatory statement, and an expression of gratitude." *Id.* at 4a. The court noted *Buckley*'s holding that the Act's disclosure requirements are the "'least restrictive means' of furthering * * * substantial government interests," *id.* at 15a, and found it significant that the "best efforts" provision offers an optional safe harbor that was added only after *Buckley* upheld the statute's absolute disclosure requirements, *ibid.* The court affirmed the district court's observation that the "best efforts" regulation "does

not compel political committees to do anything, and there is no penalty for violation of the 'best efforts' regulation." *Id.* at 16a. In addition, the court of appeals concluded that the restriction of speech was content-neutral. "It forbids additional speech not because of any hostility to the content of that speech, but to 'ensure that a written request for the information is not overlooked.'" *Ibid.* (quoting 58 Fed. Reg. 57,727 (1993)). The court further determined that the regulation imposed only a minimal financial burden that is not unconstitutional, especially in light of *Buckley*'s conclusion that the Act's disclosure requirements serve interests compelling enough to outweigh the fact that they "would financially burden campaigns by deterring some donors from contributing." Pet. App. 17a (citing *Buckley*, 424 U.S. at 68).

ARGUMENT

The decision of the court of appeals upholding the best efforts regulation is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court upheld the FECA's requirement that political committees disclose to the FEC each significant contributor's "name and address, as well as his occupation and principal place of business." *Id.* at 82. The Court explained that such a mandate is constitutional because it "serves informational functions, as well as the prevention of corruption and the enforcement of the contribution limitations." *Id.* at 83. When the statute was upheld in *Buckley*, it contained no exception for a committee that was unable to obtain the required information. As the court of appeals concluded:

> Indeed, because the "best efforts" provision—added to the Act after the Court decided *Buckley*—essentially offers an optional safe harbor or affirmative defense for political committees unable to secure the identifying information, it actually makes the Act's reporting requirements less stringent than the absolute disclosure requirements upheld in *Buckley*. As the district court explained, "the 'best efforts' regulation does not compel political committees to do anything, and there is no penalty for violation of the 'best efforts' regulation." *Republican Nat'l Comm.*, No. 94-1017, slip op. at 11. Because the absolute disclosure requirement at issue in *Buckley* does not violate the First Amendment, neither can an optional safe harbor for those unable to comply with the absolute disclosure requirement.

Pet. App. 15a-16a. Thus, petitioners are incorrect in claiming that the regulation purports to "allow the government unprecedented control over political entities' speech." Pet. 12. By upholding the disclosure provision of the FECA in *Buckley*, the Court has made clear that the Commission may undertake reasonable steps to meet the purposes underlying the statute.

2. a. Contrary to petitioners' assertion, the court of appeals did not hold that "*any manner* in which the FEC chose to define 'best efforts' as a lessening of the disclosure requirement would also be constitutional." Pet. 11 (emphasis added). Instead, as petitioners later concede (Pet. 18), the court of appeals "also considered the speech ban in the required follow-up inquiries on its own terms." See Pet. App. 16a-17a.

The court of appeals properly determined that the regulation's restrictions on additional speech in the follow-up request are content-neutral and thus valid "if they are 'narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" Pet. App. 16a (quoting *United States* v. *Grace*, 461 U.S. 171, 177 (1983)). The regulation prohibits *all* extraneous material from the follow-up request that would clutter and obscure the information request. As the court of appeals explained, the regulation "forbids additional speech not because of any hostility to the content of that speech, but to 'ensure that a written request for the information is not overlooked.'" Pet. App. 16a (quoting 58 Fed. Reg. 57,727 (1993)). But since petitioners remain entirely free to express their views to their contributors on any subject in all other communications, the regulation amounts to nothing more than a reasonable time, place, or manner restriction on such speech. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989). As the Court stated in *Ward*, the "controlling consideration" for courts in assessing a First Amendment challenge is the government's purpose for the restriction. *Ibid.* The Commission's rationale for the rule is to maximize the likelihood that recipients will not overlook the information request, not to suppress the political messages of committees.

Petitioners essentially concede that the regulation is content-neutral when they state that "the regulation may operate against all speech," Pet. 19 n.16, but they nonetheless contend that because the "ban occurs in a forum for pure political speech, * * * the regulation actually focuses the ban on political speech," *ibid.*, and thus is invalid. The purported

"forum," however, derives solely from the regulation's requirement that political committees make one additional request for donor information without being fettered by other information about politics or other subjects. That requirement does not become "content-based" because petitioners desire to transform the follow-up letter into a vehicle for the dissemination of messages unrelated to the narrowly-tailored, legitimate purpose the letter is required to address. See *Madsen* v. *Women's Health Ctr.*, 114 S. Ct. 2516, 2523 (1994) (injunction preventing protesters from interfering with abortion clinic was content-neutral, despite anti-abortion views of particular protesters).[3]

b. The regulation is narrowly tailored to serve a compelling government interest and leaves open ample alternative channels of communication. As the court of appeals found:

> The administrative record identifies as one cause of low donor response rates the burying of requests for donor information among other material. Because the regulation prohibits that practice, we are satisfied that it promotes the

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[3] Petitioners also cite (Pet. 18) *McIntyre* v. *Ohio Elections Comm'n*, 115 S. Ct. 1511 (1995), for the proposition that the "best efforts" regulation is content-based. *McIntyre*, however, dealt very specifically with an individual's right to circulate anonymous campaign literature, and the Court explicitly distinguished *Buckley* and the disclosure provisions of the FECA. *Id.* at 1522. Moreover, unlike the Commission's regulation, the provision at issue in *McIntyre* "covered documents * * * defined by their content—only those publications containing speech designed to influence the voters in an election need bear the required markings." *Id.* at 1518.

> very gathering of information that *Buckley* found to be in the public interest.

Pet. App. 16a-17a. Petitioners may urge support for particular candidates and solicit funds to pay for their political activities—in all communications other than the follow-up request—without running afoul of the "best efforts" regulation.[4]

That the law does not obligate contributors to provide the personal identifying information does not lessen the importance of the governmental interest at stake, as petitioners assert, or suggest that "best efforts" should be interpreted to require only a nominal effort by political committees to solicit the information. See Pet. 20. To the contrary, Congress imposed a requirement of "best efforts" on political committees to stress the importance of their making a substantial, rather than *pro forma*, effort to solicit this information from contributors who otherwise may not be aware of the statutory disclosure provisions. Thus, when the "best efforts" provision was recodified in 1979, the Committee on House Administration noted that "[t]he best efforts test is crucial since contributor information is voluntarily supplied by persons who are not under the control of

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[4] Thus, petitioners are free to explain in their written solicitations that unless the contributor provides the requested information, petitioners will need to expend part of the contribution to make a written or oral stand-alone request for missing contributor information (for contributors over the $200 threshold). Such an explanation would not only be permissible under the regulation, but might also persuade many contributors concerned about petitioners' use of resources to provide the requested information initially, so that fewer follow-up requests would be necessary.

the committee." H.R. Rep. No. 422, *supra*, at 14.[5] Similarly, this Court has already ruled that donors' privacy interests do not render the disclosure provision invalid or reduce the importance of the governmental interest. As the court of appeals explained:

> The Supreme Court considered the important privacy and association rights at stake for donors, acknowledged that "public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute," and held that the disclosure requirements were "the least restrictive means" of furthering the substantial government interests.

Pet. App. 15a (quoting *Buckley*, 424 U.S. at 67-68). In sum, the regulation's restriction on extraneous messages in follow-up requests is content-neutral and narrowly tailored, leaves ample opportunity for petitioners to speak on any subject in all of their

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[5] In 1976 the Senate rejected an effort to eliminate the requirement of reporting a contributor's occupation and employer. 122 Cong. Rec. 6963. Senator Clark explained that "[d]isclosure of a contributor's occupation and place of business, including the name of the firm where the person is employed, is vitally important if the public is to know and understand the source of a candidate's campaign funds." *Ibid.* When Senator Packwood introduced the "best efforts" amendment only a week later, he did not suggest that it was intended significantly to weaken this reporting requirement or to protect the privacy rights of contributors. Instead, he called it an "anti-nit-picking amendment" that was designed to do no more than protect political committee treasurers when they are unable to obtain the information from contributors even though they tried to do so. See *id.* at 7922.

other communications, and serves compelling governmental interests.[6]

3. a. The "best efforts" regulation is a reasonable interpretation of the FECA. "The starting point in interpreting a statute is its language." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 409 (1993). Congress did not define "best efforts," but the statutory phrase clearly embraces a range of permissible interpretations, and the Commission's regulation falls easily within that range. First, "best" is an adjective of the superlative degree. Congress did not require "some," "good," or "inexpensive" efforts, but rather "best" efforts. Second, as a plural noun, the term "efforts" on its face is contrary to petitioners' argument (Pet. 24) that the statute precludes the Commission from requiring more than "a single, clear request accompanying each solicitation." Third, the term "efforts" denotes affirmative exertion or work, not passive receptivity. Petitioners' proposal of a single effort that may be fettered by competing information is thus inconsistent with the statute's plain meaning.

Moreover, because "best efforts" is not defined by statute, the Commission's interpretation is entitled to deference. *Good Samaritan Hosp.*, 508 U.S. at 414, 417-418. Here, the amount of effort required of

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[6] Petitioners' reliance (Pet. 20 n.18) on *City of Ladue* v. *Gilleo*, 114 S. Ct. 2038 (1994), is misplaced. In that case, a city sought to reduce visual clutter as an end unto itself, an interest that was "valid" but not compelling. See *id.* at 2045. Here, the Commission did not act in order to make follow-up requests more attractive, but rather because there was record evidence that requests for donor information had become buried in cluttered texts, thereby depressing the disclosure rate of information that helps prevent the corruption of federal elections.

political committees in the "best efforts" regulation is quite modest, and since the Commission's "interpretation of a statute is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction." *Id.* at 417. See also *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As the court of appeals found, because the regulation does not raise "serious constitutional questions," there is no reason "to assume Congress did not intend to authorize [the regulation's] issuance." Pet. App. 15a (quoting *Rust* v. *Sullivan*, 500 U.S. 173, 191 (1991)).

b. The regulation is consistent with the legislative history of the Act. As the court of appeals explained (Pet. App. 6a), the 1979 House report upon which petitioners rely in arguing that Congress intended for only a single request to suffice for "best efforts" is "essentially post-enactment history, carrying little probative weight" because the 1979 Amendments merely recodified the 1976 provision without substantial change. See pp. 2-3, *supra*; *Finley* v. *United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'").

Petitioners rely (Pet. 23-24) primarily upon a single sentence in the 1979 House Report, which states: "If the committee [has] made an effort to obtain the information in the initial solicitation and the contributor ignored the request, the Commission should not require the committee to make the same request two, three, or four times." H.R. Rep. No. 422, *supra*, at 14. The very next sentence of that House Report, however, makes clear the reasonableness of

the FEC's construction of the "best efforts" language: "On the other hand, if the best efforts test is not met, the committee must be required to take corrective action, *such as contacting the contributor and requesting the information.*" *Ibid.* (emphasis added). Placed in its proper context, the passage to which petitioners refer suggests only that Congress did not intend to authorize the Commission to require repeated and persistent efforts by political committees to obtain the requisite donor information. A single, unfettered follow-up by the recipient, however, comports fully with Congress's intent.[7]

c. Finally, the court of appeals properly concluded that the Commission's new regulation is not unrea-

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[7] In any event, in stating that the Commission "should not" require committees to make repeated requests for the information, the legislative history on this point at most expresses a preference of "how Congress expected or intended the [agency] to behave," when what is dispositive for this Court is how Congress "*required* [the agency] to behave" in the statutory language itself. *International Union* v. *Donovan*, 746 F.2d 855, 860 (D.C. Cir. 1984), cert. denied, 474 U.S. 825 (1985). Such an admonition may appropriately be read as "a form of notice" that if the Commission required political committees to make numerous redundant requests for applicable donor information, "Congress might respond with a legislative remedy." *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 617 (1991). Pursuant to 2 U.S.C. 438(d), the Commission must transmit any proposed rule or regulation to Congress, and such regulation cannot become final until 30 legislative days have elapsed. With respect to the "best efforts" regulation at issue here, no legislation or resolution was introduced to overrule the Commission's new regulatory interpretation of "best efforts," thus providing an important "indication that Congress does not look unfavorably" upon the Commission's construction of the Act. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 34 (1981).

sonable simply because its prior regulation required only one clear request for contributor information:

> As the Court stated in *Chevron*, "[a]n initial agency interpretation is not instantly carved in stone." 467 U.S. at 863. "[T]o engage in informed rulemaking," the Court observed, an agency "must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64. That is exactly what the Commission did here. The mere fact that the Commission changed the prior regulation does not make the new regulation an unreasonable construction of the statute.

Pet. App. 8a-9a. Accordingly, the Commission's explanation is entitled to deference. See, *e.g.*, *Chevron*, 467 U.S. at 863.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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